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SUPREME COURT OF THE UNITED STATES
OCTOBER, 1989 TERM

TONY LEWIS,
PETITIONER

VERSUS

STATE OF LOUISIANA,
RESPONDENT

IN RE:

APPLICATION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL,
STATE OF LOUISIANA,
SECOND CIRCUIT

RESPONSE BY THE STATE OF LOUISIANA TO THE APPLICATION BY PETITIONER

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28 pp

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STATEMENT OF THE CASE

This brief is on behalf of the State of Louisiana in response to the brief filed by Tony Lewis in support of his petition to this court for a writ of certiorari. His request is for this Court to review the order of the Supreme Court of the State of Louisiana in refusing to review the decision of the Court of Appeal, State of Louisiana, Second Circuit. State v. Lewis, 535 So.2d 943 (La. App. 2nd Cir., 1988), certiorari denied, 538 So.2d 600 La. S.Ct., 1989. The Court Appeal affirmed the decision of the District Court, which had refused to suppress the fruits of a search warrant used in connection with the trial of petitioner.

In the District Court, petitioner was tried and convicted of possession of a firearm by a convicted felon in violation of LSA - R. S. 14:95.1. The firearms giving rise to this conviction was seized at the home of petitioner in connection with a search warrant issued by Judge Robert E. James, Judge of the Ruston Municipal Court, Lincoln Parish, Louisiana, on December 8, 1986, based on an affidavit executed on the same date by Inspector Jay Kavanaugh, Ruston Police Department, Ruston, Louisiana. This search warrant was served on petitioner on December 10, 1986, and the search conducted at that time. The firearms were not specified in the warrant.

The facts upon which the search warrant was based were that on September 3,

1985, the residence of Steven Lee, Ruston, Louisiana, was burglarized and two (2) Cerwin Vega stereo speakers were stolen along with other items including a stereo receiver, a cassette deck and a color television. On December 5, 1986, Steven Lee reported to the Ruston Police Department that Jack Reeves, owner of Zack's Bar in Ruston, Louisiana, was in possession of the stolen speakers. An investigation was made in which it was determined that the speakers in Zack's Bar were those stolen from Steven Lee and that these speakers had been purchased by Mr. Reeves from Tony Lewis on September 10, 1986, at the latter's residence. The affidavit set forth that Mr. Reeves, in the course of looking over the speakers, had observed additional

stereo equipment at the Lewis residence. On December 10, 1986, after having found Mr. Lewis at home, the search warrant was executed in the course of which search officers located a shoulder holster, a .45 caliber automatic pistol, a 9 millimeter assault pistol, a 12 gauge shotgun and an owner's manuel for the assault pistol. Other items of contraband were found but these were not a subject of the motion to suppress.

The motion to suppress was timely filed in the lower court by defendant based on the defectiveness of the search warrant. It was urged that the affidavit upon which the search warrant was based did not show proper cause for the issuance of the warrant. This motion to suppress was

denied by the lower court and defendant was convicted of possession of a firearm and sentenced to six years at hard labor without benefit of parole, probation or suspension of sentence. This conviction was subsequently appealed and the judgment of the lower court was affirmed. State v. Lewis, supra.

The Appellate Court did find that the search warrant was defective in that it was issued on the basis of an affidavit which showed only possible cause rather than a reasonable probability of cause. However, the conviction was affirmed on the basis of the good faith of the officer in acting upon the warrant issued by the Magistrate. Petitioner then applied to the Louisiana Supreme Court for a Writ of Certiorari to

review the decision of the Court of Appeal, which application was denied. State v. Lewis, supra.

As respondent appreciates the petitioner's application for review, the two questions involved are (a) the validity of the search warrant issued by Judge James and (b) the good faith of the law enforcement personnel in acting upon this search warrant. These are the two issues which will be pursued by respondent.

SUMMARY OF ARGUMENT

A. A legal search may result in the seizure of items not listed in the search warrant if it is immediately apparent to the officer that the items observed may be evidence of crime, contraband, or otherwise subject to seizure.

B. The search warrant issued by Judge James was valid by reason that the affidavit upon which it was based was facially sufficient so as to show a fair probability that contraband and/or evidence of a crime would be found at the premises of the defendant in that,

(1) The contention that the information upon which the affidavit and the resulting

search warrant was based did not set forth sufficient cause is without merit.

(2) The contention that the information contained in the affidavit, upon which the search warrant was based, was stale is equally without merit.

C. The search warrant issued by Judge James, even though invalid, was facially sufficient for the action by the Ruston Police Department in that,

(1) The officer making the seizure of the contraband was reasonable in acting on the warrant;

(2) The good faith of the officer was not obviated by the alleged receipt shown him by the defendant.

ARGUMENT

A. Preface

The Court's attention is directed to the fact that this is a State Court proceeding in which the Federal Court has been requested to intervene in the matter of a Motion to Suppress. This is despite the fact that this Motion to Suppress was considered in an evidentiary hearing in the lower court, was considered by a Court of Appeal, and certiorari was denied by the Louisiana Supreme Court. On this basis, it would appear that a further review by this Court would be unnecessary and unjustified. This is in line with the sentiment expressed in Stone v. Powell, 428 U. S.

433, 49 L.Ed. 2d 1046, 96 S.Ct. 3037 (1976). It is recognized that the Powell case was a habeas corpus proceeding. Yet, it would appear that the same reasoning is applicable.

In considering this search warrant, and the fruits thereof, the Court is reminded that the fruits of a lawful search warrant extends to matters other than those named therein. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971). This case is amplified by Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed 2d 502 (1983), which states that items inadvertently found in a legal search may be seized if it is apparent to the officers that these items may be evi-

dence of crime, contraband, or otherwise subject to seizure.

B. Validity of Search Warrant

It is of course the position of respondent that this search was lawful because it was based on a valid search warrant. The search warrant was issued by Judge Robert G. James, whose qualification to issue this warrant is not questioned in applicant's petition. It was based on an affidavit executed by a law enforcement officer, which affidavit particularized the basis for the request. All necessary formalities were observed in the issuance and execution of this search warrant.

(1) Probable Cause:

Petitioner urges that the Louisiana Appellate Court was correct in finding the

warrant to be invalid by reason of the fact that the affidavit upon which it was issued demonstrated a mere possibility that stolen property would be found. The affidavit states that the affiant has reason to believe that certain listed property, which had been the subject of a burglary, was located in the described residence. The affidavit stated further that the burglary included the theft of two speakers sold by defendant-petitioner to a third party. Finally, it sets forth that the purchaser of the speakers advised the investigating officer that, at the time he looked at the speakers in the home of petitioner, he observed additional stereo equipment located there.

At this point, it seems proper to point out that the requirement for a search

warrant is not that the evidence upon which it is based shows beyond a reasonable doubt that contraband will be found. Nor can it be said that this must be shown by a preponderance of the evidence. The requirement is simply that the information upon which the warrant is based demonstrates a fair probability that the items listed therein will be found by the authorized searcher. Illinois v. Gates, 462 U. S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983), and United States v. Travisano, 724 F.2d 341 (2nd Cir., 1982). Certainly, this was shown.

It will be noted that the State Appellate Court in affirming the factual findings of the District Court states the affidavit establishes the place to be searched; the items to be searched for

described in detail; that these items had been the subject of a burglary; that the owner of these items positively identified two of the items as having been taken from his home in the burglary; that the possessor of the two items had purchased them from the defendant after viewing them in defendant's home; and that the purchaser from the defendant definitely stated he saw other stereo equipment on these premises.

Yet it states, in an admitted "close call", that it does not consider the facts provided to lead to a practical common sense conclusion that there was a "fair probability" that the other stolen items would be found in defendant's home. This finding appears to be contrary to the generally accepted rule which now prevails.

Considering that the equipment listed in the search warrant was not articles which would likely be moved unless disposed of by defendant, that a market for these type of articles was not readily available, that two of the items in the burglary were in defendant's home three months before the search warrant was issued, and that the information upon which the search warrant was based stated that there was other stereo equipment on the premises, there certainly appears to be a totality of circumstances so as to make the affidavit upon which the warrant was based more than adequate.

2. Staleness of Information:

The State Appellate Court was not specific as to the ground for finding that the

information upon which the warrant was issued presented only a possibility that contraband would be found. Petitioner-defendant urges that it was "staleness of the information".

The petitioner does not seem to question the fact that the search warrant was obtained and executed within a reasonable period after the information had been obtained by the Ruston Police Department. His contention is that the information upon which the warrant was based was stale prior to the time that it came to the attention of the authority. He appears to argue that, simply by reason of the fact the speakers were taken in a burglary approximately one year and three months prior to the issuance of the search warrant, there

was not a reasonable cause for the issuance of a warrant.

He cites Sgro v. United States, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932). This decision has not been applied by this Court in many instances. However, it has been considered by the lower courts on numerous occasions and its holding has been limited. For instance, in United States v. Rahn, 511 F.2d 290 (10th Cir., 1975) a search was upheld based on information concerning observations by the informant two years previous to the issuance of the warrant. In determining that the information provided in support of the search warrant was timely, the Court conceded that "time was a crucial element of probable cause". Appropriately, it

cautions "However, probable cause is not determined by merely counting the number of days between the time of the facts relied upon and warrants issuance." This case cites U. S. v. Johnson 461 F.2d 285 (10th Cir., 1972) which states:

> "Bearing in mind both the element of time and the nature of the facts relied upon in the affidavit, the question of probable cause in the case at bar becomes a question of whether or not the Commissioner could have reasonably presumed the likelihood of a continuing violation. The facts supporting such a presumption were more than ample. The Commissioner should have considered all of the elements of probable cause, including the nature of the criminal activity, the length of the activity, and the nature of the property to be seized; probable cause, in turn, should have been contemplated in view of the practical considerations of everyday life."

A similar holding is U. S. v. Batchelder, 824 F.2d 563 (7th Cir., 1987) states:

> "It is the magistrate's duty to make a 'practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him ... there is a fair probability that contraband or evidence of a crime will be found in a particular place.' United States v. Malsom, 779 F.2d 1228, 1237 (7th Cir., 1985) (quoting Illinois v. Gates, 462 U. S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983)). The age of the information supporting the application for a warrant is a factor that a magistrate should consider. It is, however, only one factor. If other facts indicate that the information is reliable and that the object of the search will still be on the premises, then the magistrate should not hesitate to issue a warrant."

Based on the foregoing, the key appears to be "did Judge James have reaso-

nable cause to believe that the object of the search would still be on the premises?" It is urged that the answer is in the positive.

C. Good Faith of the Parties

It will be noted that the State Appellate Court, in finding the search warrant to be invalid, stated that it was a close call. However, it expressed no reservation as to its finding that the search was a valid search. In so holding the Second Circuit Court of Appeal, State of Louisiana, stated as follows:

> "In a close call, we have determined that the information contained in the officer's affidavit did not amount to probable cause, but the closeness of the call compels a conclusion that the officer's belief in the existence of probable cause was not entirely

> unreasonable. The police officers acted on the information soon after it was provided to them in a diligent manner, and the affiant was objectively reasonable in relying on the judge's probable cause determination. Exclusion of evidence discovered through the initial and subsequent warrant is inappropriate in this case which falls within the Leon rule." State v. Lewis, supra.

This finding is, of course, dictated by U. S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1984). The State Court correctly summed up the rule enunciated in that case in stating:

> "Exclusion is not always inappropriate in cases where an officer has obtained a warrant and abided by its terms. Although a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good

faith in conducting the search, nevertheless, the officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant has been properly issued. State v. Wood, supra."

There are four exceptions to the 'good faith' exception, or instances in which suppression remains an appropriate remedy: (1) if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) where the issuing magistrate wholly abandoned his detached and neutral judicial role; (3) where the warrant is 'based on an affidavit so lacking in indicia of probable cause as to render official belief in its

> existence entirely unreasonable'; and (4) where the warrant is so facially deficient, i.e., fails to particularize the place to be searched or the things to be seized, that the executing officers cannot reasonably presume it to be valid. State v. Wood, supra."

As to reasons numbered 2 and 4, petitioner appears to have abandoned these even though he had made some argument in the State Court as to the issuing magistrate having abandoned his neutral judicial role. This is indeed understandable in view of the fact the record contained not a scintilla of evidence to support the bad faith of Judge James. Also there is no question but that the warrant particularizes the place to be searched and the items to be seized.

In judging this good faith issue, we are left with the questions (a) was the warrant so lacking of probable cause so as to render it unreasonable for the searcher to believe in its validity; and (b) was the affidavit on which the search warrant was based known to be false by the searcher or would have been known to be false except for his reckless disregard.

1. The searcher was reasonable in relying on the search warrant

Seemingly, in attempting to have this exception to the Leon rule applied, petitioner raises the question of staleness. This has, of course, been discussed previously in regard to the validity of the search warrant. However, it is also the position of respondent that staleness is

not an issue in this phase. Respondent finds no case in which the bad faith of the searcher is found because the warrant contained facts demonstrating the staleness of the information upon which it was based. This is not within the province of the officer. This is within the judicial discretion of the issuer of the warrant. In this instance the full facts were presented to the issuing magistrate. Based on these facts, he concluded that the information upon which it was based was sufficient. Accordingly, it would appear most arbitrary to find Inspector Kavanaugh in bad faith because he failed to refuse to execute a warrant on the basis that Judge James committed judicial error. This appears to be the basis of the

rulings in a number of cases finding there was good faith including United States v. Thomas, 757 F.2d 1359 (2nd Cir., 1984), where the issue was staleness of the information. Also, see United States v. Gant, 759 F.2d 484 (5th Cir., 1985).

2. Did the purported receipt negate the searcher's good faith?

The lower court had no difficulty in finding that Inspector Kavanaugh was in good faith in relying on the magistrate's probable cause determination and that the technical sufficiency of the warrant issued was objectively reasonable. It would appear that its finding was imminently correct and in line with the authorities following U. S. v. Leon, supra.

In an effort to come within Exception 1, the petitioner has utilized the fact that defendant presented to Inspector Kavanaugh a receipt allegedly showing that he had purchased the speakers from another party. He contends that this made the information in the affidavit false and this false information was known to the searcher, Inspector Kavanaugh. The evidence clearly established that the purported receipt contained no information directly relating it to the speakers. In addition, the signature on the receipt was illegible making it most suspect and affording the investigating officer no reasonable grounds to believe that it established the speakers had been purchased by the defendant.

The applicant cites no cases in support of his position and respondent finds no cases in point to support its position. However, as the question on good faith is that of reasonableness, such would seem to apply in this instance. LaFave, Search and Seizure, 2d Ed., Vol.1, P. 76-77 suggests that the test should be "whether a reasonably well trained officer would have known that the basis of the affidavit upon which the search warrant was based was illegal and his request for the warrant was outside the range of professional competence expected of an officer." It is to kept in mind that the investigation necessary for the application of a search warrant is not an adversary proceeding and the applicant is not

required, nor qualified, to conduct a judicial proceeding in the process of executing a warrant. He is simply required to act reasonable.

The purported "receipt" displayed by defendant was described by the officers as a scrap of paper with the single word "speakers" and an illegible signature upon it. There was nothing else. The "document" fails to show that it has reference to the particular speakers in question, fails to show whether it has reference to Lewis' acquisition of the speakers or his sale thereof to Reeves, and fails to show consideration or anything else which would aid the police in determining whether Lewis possessed these speakers legally or illegally.

Certainly, Inspector Kavanaugh was not unreasonable in refusing to accept this receipt as such proof so as to place him in bad faith in proceeding to execute the search warrant.

CONCLUSION

The only question involved in this application for a writ of certiorari is "were the fruits of a search warrant issued herein tainted by reason of the search warrant having been improperly granted or executed."

This Court in U. S. v. Ventresca, 380 U. S. 102, 85 S.Ct. 741 (1965) stated:

> "However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate

> the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." (Underscoring ours.)

Such seems to be applicable to this case. It is submitted that the warrant, and the affidavit upon which it was based, was sufficient in every respect. The State Appellate Court was in error in finding that the affidavit stated only a possibility rather than the required fair probability. In considering Mapp v. Ohio, 367 U. S. 643, 81 S.Ct. 1684, 62 L.Ed. 2d 1981 (1961), and U. S. v. Leon, 468 U. S.,

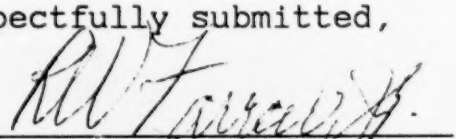
897, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1984), the courts have spoken often of the "totality of the circumstances" in finding that the search warrant was valid. Certainly, in this instance, this requirement was properly met.

However, assuming that the warrant was invalid, this did not void the search. As found by the State Appellate Court, the execution of the warrant was proper by reason of the good faith exception set forth in the Leon case. The petitioner's efforts to demonstrate bad faith does not in any way question the competence or integrity, either personal or professionally, of either the law enforcement personnel or the signing magistrate. Instead, he attempts to impugn bad faith

on the basis of reliance on stale information and a failure to accept a purported receipt furnished by the defendant. There is considerable question as to whether or not either of these should be considered in connection with the matter of good faith. If the Court should so hold, respondent deems its presentation to have clearly resolved these questions in favor of the State.

Accordingly, it is respectfully submitted that the Motion to Suppress was properly denied in the Trial Court and this action properly affirmed in the State Appellate Court. Therefore, the petition for certiorari submitted by defendant should be denied.

Respectfully submitted,

By: 

R. W. Farrar, Jr., Esq.
LEAD COUNSEL

CERTIFICATE

I hereby certify that a copy of the foregoing Response to Petition for Writ of Certiorari has been served upon the applicant, Tony Lewis, by mailing three (3) copies of same to his attorney of record in the manner provided by Rule 33, Rules of the U. S. Supreme Court, addressed as follows:

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